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Supreme Court, U.S.
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No. 07-1450

IN THE
SUPREME COURT
OF THE UNITED STATES

ASSOCIATION OF CIVILIAN TECHNICIANS,
NEW YORK STATE COUNCIL,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Petitioner is part of the Association of Civilian Technicians, Inc. The corporation has no parent corporations. The corporation has issued no stock. Consequently, no publicly held company owns any.

REPLY TO BRIEF IN OPPOSITION

The government ignores the text of 5 U.S.C. § 7121. When "an unfair labor practice" is "raised under a grievance procedure," as § 7116(d) expressly allows, the grievance process must include "procedures for resolving" the claim, including "binding arbitration" that a union unilaterally may invoke if the claim is "not satisfactorily settled." § 7121(a)(1) and (b)(1)(C)(iii). As Judge Tatel recognized, the statute gives the union a *right* to *resolution* of unfair labor practices that it has *raised* through the grievance procedure. App. 20a-21a.

The Federal Labor Relations Authority's order "involves an unfair labor practice," within the meaning of the judicial review statute, § 7123(a), because the union's grievance raised unfair labor practices; the union pursued arbitration of the claims; the arbitrator, contrary to § 7121, failed to resolve them; and the Federal Labor Relations Authority, contrary to § 7122(a)(1), refused to afford relief. Ignoring the text of § 7121, the Authority held that—absent stipulation by the employer, the accused wrongdoer—the arbitrator was "not obligated to address and resolve" the union's unfair labor practice claims. App. 26a. As Judge Tatel noted, the Authority's order "necessarily implicated" and therefore "involve[d]" an unfair labor practice because the order "dispos[ed]" of the union's unfair labor practice claims "for all time"—leaving the union with no relief and no decision of the merits of the claims.

App. 15a-16a, *citing Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 67-68 (D.C. Cir. 1987) (jurisdiction lies under § 7123(a) if unfair labor practice is "necessarily implicated by the Authority's decision").

The court of appeals had jurisdiction under § 7123(a), as Judge Tatel also noted, App. 13a, because the union "characterized its claim as a statutory unfair labor practice," *United States Dep't of Interior v. FLRA*, 26 F.3d 179, 183 (D.C. Cir. 1994), and "pursued [its claim] as a statutory unfair labor practice," *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 64 (D.C. Cir. 1987). Contrary to the government's brief at 9-10 n. 4, it is the characterization of the claim by "the aggrieved party," not the arbitrator, that is controlling. *United States Dep't of Interior*, 26 F.3d at 183. Under § 7121, it is the aggrieved party that has the *right* to resolution of unfair labor practices that it has *raised* through the grievance procedure.

Other government points also are wrong. The government erroneously asserts that the Authority merely "deferred" to the arbitrator's exercise of "broad discretion" to "formulat[e]" the issue presented. Resp. Br. at 10-11. As Judge Tatel said, the arbitrator "inexplicably ignored" the union's unfair labor practice claims; and the Authority ruled as a matter of law that the arbitrator had "no obligation" to resolve the claims absent the consent of the accused wrongdoer. App. 16a, 20a.

Contrary to the government's brief at 11, the Authority's "no obligation" rule—which grants the wrongdoer a veto over a union's *right* to obtain resolution of unfair labor practice claims raised though the grievance procedure, leaving the union at the mercy of an arbitrator who has "no obligation" to resolve the claims—is not "well-established." This is the first unfair labor practice case in which the Authority has applied the rule. The precedent that the Authority cited, *AFGE Local 1367*, 60 FLRA 1387 (2004), App. 30a, did not involve an unfair labor practice claim and therefore could not be reviewed under § 7123. No court has held that the Authority's "no obligation" rule is compatible with § 7121.

Contrary to the government's brief at 8-9, the ignoring of claims allowed by the Authority's "no obligation" rule promotes chaos, not "uniformity in the case law concerning unfair labor practices." Under the Authority's ruling, identical unfair labor claims can produce opposite results in neighboring bargaining units, based solely on the caprice of the wrongdoer and the arbitrator.

Contrary to the government's brief at 12, the possibility that a frivolous unfair labor practice claim might be raised does not justify a rule denying judicial review to parties whose unfair labor practice claims are ignored, without regard to their merit.

Finally, contrary to the government's brief at 10, judicial review and rejection of the Authority's

"no obligation" rule would benefit the union, because, as Judge Tatel said, it would result in "remand [of] the case to the Authority with instructions to return it to the arbitrator for a decision on the merits of the union's unfair labor practice claim[s]." App. 21a.

The petition for a writ of certiorari should be granted. Under the Authority's "no obligation" rule and the jurisdictional ruling below, unions are no longer litigants with rights; rather, they are supplicants to be indulged or dismissed at the whim of the employer and the arbitrator. If the employer and the arbitrator simply choose to ignore the union's unfair labor practice claims, the Authority's "no obligation" rule approves the denial of relief and the court of appeals declines review. This process is more akin to beseeching a potentate than it is to litigating rights.

Respectfully submitted,

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